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Maryland State Teachers Association and Jeffrey J. Dean and Edward Charles Fortney. Cases 5–CA–31962 and 5–CA–31963

June 9, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On March 24, 2005, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Maryland State Teachers Association, Annapolis, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by making job-security threats and by interrogating employees.

² We conclude that Respondent Assistant Executive Director Dale Templeton told employees Jeffrey Dean and Edward Fortney that she was tired of receiving their letters and that the letters would have to stop. The Respondent contends that Templeton effectively repudiated these remarks. In this regard, the Respondent points to an alleged statement by Templeton to the employees that she was not threatening discharge. We find that the Respondent did not prove that Templeton made the allegedly curative statement. We accordingly reject the contention on this basis and find it unnecessary to decide whether the alleged statement would have effectively repudiated the unlawful remarks. The only evidence suggesting that Templeton made the alleged statement is language in Dean's Board affidavit. However, Dean's affidavit was not introduced into evidence, Dean denied at the hearing that Templeton made the alleged statement, no other witness testified about it, and Karen Dean's written notes of the meeting (that the judge credited as showing what was said at the meeting) do not refer to Templeton's alleged statement.

Dated, Washington, D.C. June 9, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Stephanie Cotilla, Esq., for the General Counsel.
Jeffrey E. Rockman and Christopher M. Feldenzer, Esqs. (Serotte, Rockman & Wescott, P.A.), of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on January 20, 2005. Jeffrey Dean and Edward Fortney filed the charges that give rise to this case on June 8, 2004. The General Counsel issued a consolidated complaint on September 24, 2004. This complaint alleges that Respondent, the Maryland State Teacher's Association (MSTA), by Dale Templeton, its assistant executive director for affiliates and advocacy, violated Section 8(a)(1) of the Act during a meeting with Dean and Fortney on December 17, 2004. The General Counsel alleges that Respondent, by Ms. Templeton interfered with, restrained and coerced Dean and Fortney in the exercise of their Section 7 rights to engage in concerted activities for the purpose of their mutual aid or protection.

Specifically, the General Counsel alleges that Respondent, by Templeton, violated the Act by telling Dean and Fortney that she was tired of receiving letters they had written regarding the terms and conditions of their employment, that such letters would have to stop if Dean and Fortney were to remain Respondent's employees and that because they had written such letters, their jobs would be the first ones eliminated if Respondent's membership did not increase. Finally, the General Counsel alleges that Templeton violated the Act by interrogating Dean and Fortney as to whether they had filed a complaint with the Maryland Department of Labor, Licensing and Regulation concerning the frequency with which they were being paid by Respondent.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, the MSTa, is a labor organization representing teachers and education support personnel in the State of Maryland. It has its principal office in Annapolis, Maryland. In the

¹ Respondent's motion to correct the transcript in the manner stated in the appendix to its brief is granted.

year prior to the issuance of the complaint, Respondent remitted dues and initiation fees in excess of \$50,000 to the national headquarters of the National Education Association in Washington, D.C. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent retained the services of Jeffrey Dean and Edward Fortney as educational support personnel (ESP) consultants in February 2002.² Respondent informed Dean and Fortney that they would be independent contractors and each signed a consultant contract. Dean and Fortney were two of three such consultants retained to work in the Maryland counties on the Eastern Shore of the Chesapeake Bay. Their duties were primarily to recruit members for the MSTa among education support workers, such as school clericals and food service workers.

Dean and Fortney worked out of their homes and for a year and half and were paid "portal to portal," i.e., from the time they left their residences until the time they returned. They were supposed to work an average of 20 hours per week, although on occasion they apparently worked considerably more than that. Dale Templeton, Respondent's Assistant Director for Affiliates and Advocacy, was their direct supervisor. She tried initially to give Dean and Fortney assignments close to their residences. Both live in the southern portion of the eastern shore, near the Virginia border. Dean lives in Princess Anne, Maryland in Somerset County, near Salisbury. Fortney lives in Berlin, Maryland in Worcester County, which is located nine miles west of Ocean City.

Due to the resignation of another ESP consultant, Respondent made Fortney a full-time temporary employee from October 2002 until August 2003. He then reverted to his position as a 20-hour a week ESP consultant. Dean and Fortney's relationship with Ms. Templeton began to deteriorate on July 29, 2003, when they approached her at the end of a leadership training retreat in Salisbury.

The two told Templeton, or demanded that Respondent change their status from independent contractors to employees by August 1, 2003, that they be included in either one of the two existing bargaining units for MSTa employees, and that their assignments be changed. By all accounts, Templeton reacted unfavorably to Dean and Fortney's requests or demands, and told them that at least one request was ludicrous.

Dean and Fortney presented Templeton with a letter on the morning of July 30, 2003. It reiterated their requests or demands from the prior evening and asked that MSTa reimburse Dean in the amount of \$3375 and Fortney in the amount of \$1500 for their payments of self-employment tax. The letter further notified Templeton of Dean and Fortney's intention to file a claim with the Maryland Division of Labor and Industry on August 4, and possibly with the Federal Internal Revenue Service, if their demands were not met. Dean and Fortney also drafted a petition seeking support from other MSTa members and were able to get two individuals to sign it.

On the afternoon of July 30, Templeton invited Dean and Fortney to meet with her. At that meeting she asked them if they had printed their petition on MSTa's copier. She was apparently no more receptive to their requests/demands than she had been the prior evening. On July 31, Templeton responded to Dean and Fortney's July 30 letter in writing (R. Exh. 1). On August 4, 2003, after consulting with Fortney, Dean filed with the IRS a request for a "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding."

Dean and Fortney mailed Templeton a letter on August 8, 2003, asking that Dean's assignments be expanded from Wicomico County to include Somerset County, and that Fortney, whose assignments had been in Somerset and Worcester Counties, be assigned to Caroline, Dorchester, and Worcester counties.³ Templeton called Dean and Fortney at the MSTa Wicomico County Office in Salisbury on August 20 about their assignments. They wrote her on August 27, to confirm that effective September 1, 2003, Templeton had assigned Dean to Wicomico, Worcester, and Somerset Counties, the three most southern counties of the Eastern shore and had assigned Fortney to Dorchester, Caroline, Talbot, Kent, and Queen Anne's Counties, the middle of the Eastern Shore.

Templeton sent Dean and Fortney an email on September 3, 2003 to clarify their work locations. In that email she told Dean and Fortney that neither was assigned to work out of the Wicomico office and that there should be little, if any, need for Fortney to be at the Wicomico office since he was assigned to the mid-shore counties. She also wrote, "I do not want any more letters or emails regarding these assignments. If you are not sure what you should be doing between now and then, clarify it with Jackie."⁴

On October 3, 2003, Templeton sent Dean and Fortney another email requesting them to meet with her on October 23, to discuss restructuring the Eastern Shore ESP consultant positions. They wrote to Templeton's boss, Betsy Moyer, MSTa's Executive Director, on October 6, expressing concerns about attending the meeting and accusing Templeton and their immediate supervisor, Jacqueline Harris, of "retaliatory, threatening and abusive behavior." Also, on October 6, 2003, MSTa Counsel Susan Russell filed a response with IRS to Dean's request for a determination of his status.

On October 23, Dean and Fortney met with Templeton, Harris, and Susan Russell, Chief Counsel for the MSTa. Dean and Fortney brought with them Karen Dean, Jeffrey's wife, who is an attorney. The MSTa representatives would not allow Mrs. Dean to attend the meeting. MSTa presented Dean and Fortney a memorandum (R. Exh. 2) that announced a change in their status from independent contractors to part-time/casual (20-hour per week) employees. It also assigned Dean to the MSTa office in Salisbury and Fortney to the MSTa office in Denton (Caroline County) and provided that they would no longer be paid "portal to portal." Dean and Fortney objected to the termination of their portal to portal pay and the assignment

² Fortney's employment with MSTa ended in February 2004, several months after filing the instant charge. Dean filed earlier charges which were dismissed by the General Counsel.

³ Dean lived in Worcester County; Fortney in Somerset. Dorchester and Caroline are to the north and west of Wicomico County, which in turn is north and west of Worcester and Somerset.

⁴ Jacqueline Harris was designated MSTa's eastern shore field director effective September 1, 2003. In that capacity, she became Dean and Fortney's direct supervisor.

of Fortney to Denton, which is approximately an hour-and-a-half commute from his residence.⁵

Dean and Fortney also requested that they be paid every 2 weeks, instead of once a month and that their checks be directly deposited into their bank accounts. MSTA representatives promised to explore direct deposit but declined to agree to pay Dean and Fortney every 2 weeks.⁶ Later, MSTA arranged for direct deposit of Dean and Fortney's paychecks.

On November 7, Templeton orally reprimanded Dean for not using a payroll dues-deduction form in signing up new members. Templeton committed the reprimand to writing on November 19 (R. Exh. 4). Executive Director Betsy Moyer wrote Dean and Fortney on November 18, rejecting their allegations of retaliatory, threatening, or abusive behavior by Templeton or Harris.

On December 1, Dean responded to Templeton concerning the reprimand, and both Dean and Fortney wrote to the MSTA Board of Directors, complaining of unfair treatment by MSTA, particularly by Templeton and Harris.

Dean and Fortney filed a complaint with the State of Maryland's Department of Labor, Licensing and Regulation concerning the frequency of their paychecks in early December 2003. The Administrator of that department sent a letter to Templeton dated December 9, 2003 informing her that Maryland statutes required an employer to pay employees at least every 2 weeks or twice a month, unless employees are classified as administrative, executive or professional. Dean, Fortney and three other ESP employees were notified on December 19, that effective.⁷

B. The December 17, 2003 Meeting

Dean, Fortney, and Karen Dean met with Templeton, Harris, and Moyer for about 2 hours on the morning of December 17, 2003 at the MSTA's office in Salisbury. Dean and Fortney complained about Fortney having to commute to Denton, Maryland, and asked that he be assigned to Salisbury. Templeton replied that Salisbury was not within the area assigned to Fortney. Dean and Fortney then requested that they be paid every 2 weeks and that they be allowed to join one of the two existing collective-bargaining units.

The MSTA representatives said that as part-time casual employees, Dean and Fortney were not eligible to be included in either existing bargaining unit. There was a discussion as to whether Fortney could work at the MSTA office in Dorchester County (Cambridge), which was closer to his home than the MSTA office in Denton. Dean and Fortney proposed that Fortney be paid from the time he entered Dorchester County, rather than when he arrived at the office. MSTA promised only to look into the possibility of having Fortney work in the Dorchester office.

Dean and Fortney also testified that during a discussion of their poor working relationship with Templeton and Harris, Templeton told them that their jobs were not guaranteed in the

budget and that if MSTA membership did not increase, or if MSTA eliminated jobs, theirs would be the first ones eliminated. They also testified that Templeton told them that if they were going to continue to be employed by MSTA, their letter-writing would have to stop. Dean and Fortney also testified that Templeton asked them if they had written to the State of Maryland about the frequency of their paychecks.

Templeton denies mentioning Dean and Fortney's job security at all. She also denies that there was any discussion of MSTA's budget at the December 17, meeting. She concedes that she told Dean and Fortney that she assumed that they were the ones who had written the State of Maryland complaining about being paid once a month.⁸ She also concedes that in the discussion of the charging parties' allegations of a hostile work environment, she told them:

so one of the pieces was I said if, you know, I'm trying to [get?] clear if you mean by a hostile work environment that, you know, where you get directives to do a task that your—if you're reprimanded for not doing your work, if that's the case and if, and if every time we turn around a letter keeps, you know, we keep getting responses, than that's going to be a problem. That's what I said as far—and it's a problem as far the relationship between the management and, and staff...

Tr. 176.

Jacqueline Harris generally corroborated Templeton's account of the meeting.

In resolving the conflict in the testimony of Dean and Fortney on the one hand, and Templeton and Harris on the other, I rely largely on the testimony of Karen Dean and her notes taken at the meeting. Karen Dean, who was present during the entire meeting, did not testify to any statements by Templeton regarding Jeffrey Dean and Fortney's job security or about the implications of the MSTA budget to their job security. Due to this, I credit Templeton's denial. Karen Dean also testified that Templeton said she would ask the other ESP employees if they wanted to be paid twice a month. However, Karen Dean testified that Templeton stated in a very hostile tone that she was tired of receiving letters from Jeffrey Dean and Fortney and that they would have to stop. I find on the basis on Karen Dean's testimony that Templeton told Jeffrey Dean and Fortney that the letters would have to stop, but did not explicitly address the consequences if they continued to write such letters.

In its brief, Respondent argues that Templeton's statement about the charging parties' letters did not violate Section 8(a)(1) because, when taken in context, her remarks clearly address only Respondent's complaints about their assignments and Dean's response to his reprimand. I reject this argument. First of all, Fortney and Dean had a protected right to concertedly seek a modification to their work assignments. Respondent was not obligated to satisfy their requests, but it is prohibited from restraining, coercing or interfering with their entreaties.

Dean's response to his reprimand is the only relevant letter that does not constitute protected concerted activity. From an objective standpoint, Dean and Fortney would not have interpreted Templeton's remarks to pertain only to Dean's letter, since many other letters did pertain to the terms and conditions

⁵ The memorandum also reiterated that Dean and Fortney were excluded from the two existing bargaining units for employees of MSTA.

⁶ Respondent did not elicit any testimony to contradict Dean and Fortney's account of the October 23 meeting. I therefore credit the charging parties' testimony in this regard.

⁷ This memo is dated 2 days after the meeting at issue with regards to the 8(a)(1) allegations in the instant case. Additionally, the IRS advised the MSTA in February 2004 that Dean was, as he had alleged, an employee for purposes of Federal Income Tax.

⁸ I credit Templeton's testimony that she stated that she assumed that the charging parties had written the letter, rather than actually making an inquiry. Karen Dean's testimony corroborates Templeton's on this point.

of their employment. Dean and Fortney would reasonably have interpreted Templeton's remarks to refer to any letters touching on their employment relationship and to have constituted an implied threat that if they continued to write such letters to her, to Moyer or to third parties, that their working relationship would continue to be unpleasant, or become even more unpleasant.

CONCLUSIONS OF LAW

Pursuant to my findings of fact, I conclude that Dale Templeton did not make any specific threats relating to the charging parties' job security as alleged in paragraphs 5(b) and (c) of the complaint. I also find that her remark, that she assumed that Dean and Fortney had filed the complaint with the Maryland Department of Labor, was not a coercive interrogation that violates Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(d). While her statement was clearly a rhetorical question, it was not violative because Jeffrey Dean and Edward Fortney had been open and notorious about engaging in concerted protected activity. Indeed, they had previously informed Templeton in writing that they would contact the IRS. Thus, the charging parties would have reasonably assumed that Templeton would suspect them as authors of the complaint to the State of Maryland. Her voicing of her suspicions in these circumstances, would not restrain, interfere with or coerce the charging parties in taking further action to change the terms and conditions of their employment.

However, I find that Dale Templeton's remarks at the December 17, 2003 meeting that she was tired of receiving letters from Jeffrey Dean and Edward Fortney and her admonition, that such letters would have to stop, violated Section 8(a)(1), as alleged in complaint paragraph 5(a). Many of their letters clearly constituted concerted activity for their mutual aid and protection that is protected by Section 7. Her remarks would reasonably restrain an employee from further exercising Section 7 rights out of fear that conduct displeasing to Templeton would lead to some form of discrimination, *Frazier Industrial Co.*, 328 NLRB 717, 726 (1999).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, the Maryland State Teachers Association, Annapolis, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening or coercing employees in the exercise of their Section 7 rights by telling them that it was tired of receiving letters constituting concerted protected activity and that such letters would have to stop.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Annapolis, Maryland facility, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(c) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., March 24, 2005.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten or coerce you from engaging in concerted protected activities for your mutual aid or protection by telling you that we are tired of such activities and that such activities will have to stop.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MARYLAND STATE TEACHERS ASSOCIATION

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."